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No. 87-6926

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1987

MILTON JOHNSON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The
Illinois Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Where the Illinois death penalty statute does not place upon a defendant a burden to demonstrate that a sentence of death should not be imposed, does the statute violate the eighth and fourteenth amendments?

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OPINION BELOW

The opinion of the Illinois Supreme Court is reported at People v. Johnson, 119 Ill.2d 119, 518 N.E.2d 100 (1987). The opinion has been submitted to this Court as Appendix A to the Petition for Writ of Certiorari and, therefore, is not contained in the Brief in Opposition.

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Petitioner, Milton Johnson, was convicted after a jury trial in the Circuit Court, Will County, Illinois, of the murders of Marilyn Baers, Pamela Ryan, Anna Ryan, and Barbara Dunbar. The respondent requested a capital sentencing hearing and petitioner waived his right to a jury. After the sentencing hearing, the court sentenced petitioner to death.

Petitioner appealed his conviction and sentence to the Illinois Supreme Court. The court affirmed the judgment of the circuit court. People v. Johnson, 119 Ill.2d 119, 518 N.E.2d 100 (1987).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The respondent respectfully requests this Court to deny the Petition for Writ of Certiorari to review the judgment of the Illinois Supreme Court. With respect to the single issue advanced for review, whether the Illinois death penalty statute places the burden on a defendant to show that death should not be imposed, the court below found that the Illinois statute places no such burden on a defendant. Respondent maintains where the Illinois Supreme Court has construed the Illinois death penalty statute as not placing on a defendant a burden to demonstrate death should not be imposed, it would not be prudent for this Court to grant certiorari in this case to review a decision of the court below which is in harmony with decisions of this Court.

WHERE THE ILLINOIS DEATH PENALTY STATUTE DOES NOT PLACE UPON A DEFENDANT A BURDEN TO DEMONSTRATE THAT A SENTENCE OF DEATH SHOULD NOT BE IMPOSED, THE STATUTE DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

The essential premise in support of petitioner's application for a writ of certiorari is that the Illinois death penalty statute, Ill. Rev. Stat. ch. 38, § 9-1(h) "create[s] a mandatory rebuttable presumption in favor of a death sentence, once a statutory aggravating factor has been found." (Petition for Writ of Certiorari at 7) The respondent maintains that this Court should deny the petition for writ of certiorari where the Illinois statute creates no such burden.

The Illinois Supreme Court has frequently held that there is no burden of production or persuasion on a defendant at a capital sentencing hearing. People v. Guest, 115 Ill.2d 72, 503 N.E.2d 255, 273 (1986) ("...defendant does not bear any burden of proving that the death penalty is inappropriate"); People v. Johnson, 114 Ill.2d 170, 499 N.E.2d 1355, 1371 (1986) ([n]either our death penalty statute nor the decisions of this

Court permit the automatic imposition of the death penalty, or likewise allow for an admonishment to a defendant that such a result shall obtain, where a capital defendant waives presentation of mitigating evidence"); People v. Del Vecchio, 105 Ill.2d 414, 475 N.E.2d 840, 855 (1985) ("...at the aggravation and mitigation hearing there is no burden of proof, but, rather, the People have the burden of going forward with the evidence...").

Most recently, the Illinois Supreme Court has stated:

> The capital sentencing decision requires a balancing process, and for that reason this Court has previously rejected the argument that the statute imposes on a defendant the burden establishing mitigating circumstances sufficient to preclude imposition of the death penalty.

People v. Orange, 121 Ill.2d 364, 390, ___ N.E.2d ___, ___ (1988). In view of the consistent position taken by the Illinois Supreme Court, clearly the court when it decided the case at bar did not depart from this Court's rulings that an individualized sentencing determination is required in each capital case. Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

Although petitioner relies on the decisions in People v. Olinger, 112 Ill.2d 324, 493 N.E.2d 579 (1986) and People v. Owens, 102 Ill.2d 88, 464 N.E.2d 261 (1984) (Petition for Writ of Certiorari at 7-8), those cases are not controlling in view of the most recent pronouncements of the Illinois Supreme Court. Moreover, Olinger and Owens are distinguishable. In Olinger, the Illinois Supreme Court did not explicitly construe the statute as placing a burden on the defendant, it reviewed a jury instruction which stated that the defendant had a burden and found no constitutional error. 493 N.E.2d at 592. In the instant case, the circuit court was the sentencing authority. In Owens, the Illinois Supreme Court held only that once the finding required by section 9-1(h) - the equivalent of section 9-1(g), applicable where a jury has been waived and the court decides the sentence - has been made, the court must sentence

the defendant to death. In other words Owens says that since a jury verdict sentencing a defendant to death is not an advisory verdict and is binding on the trial court, where the court makes the same finding at a bench sentencing it is equally bound to impose capital punishment. 464 N.E.2d at 273. This is not the same as saying that a defendant bears a burden of producing mitigating evidence and must be sentenced to death if he fails to do so.

Furthermore, petitioner's reliance on Kubat v. Thieret, No. 87 C 8423 (N.D. Ill. February 25, 1988) (Petition for Writ of Certiorari at 8), in support of the petition is misplaced. Although the district court stated "[i]n a case where no mitigating evidence is presented, the statute deprives a capital jury of the discretion to preclude the death penalty - even if the jury believes that the State's aggravating evidence does not justify a death sentence" (Appendix to Petition for Writ of Certiorari at B-4), the court held any constitutional challenge to the Illinois death penalty statute was moot in that it granted relief on other grounds. Furthermore, the views of the district court expressed in dicta are not persuasive where the case is presently on appeal to the United States Court of Appeals for the Seventh Circuit. United States ex rel. Kubat v. Thieret, Nos. 88-1440, 88-1520.

CONCLUSION

For the above-advanced reasons, respondent respectfully requests this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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